

March 12, 2008

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

EDDIE VILLEGAS,

Movant.

No. 08-2026
(D.C. No. 6:08-cv-00018-MV-LFG)
(D. N.M.)

ORDER

Before **BRISCOE**, **HARTZ**, and **O'BRIEN**, Circuit Judges.

Eddie Villegas pleaded guilty in New Mexico state court to eight counts of criminal sexual penetration of a minor and was sentenced to seventy-two years of imprisonment. He appealed to the New Mexico appellate courts, then sought in federal district court a writ of habeas corpus under 28 U.S.C. § 2254. The district court dismissed the petition without prejudice, and this court summarily affirmed that decision. *Villegas v. Williams*, No. 00-2278 (10th Cir. Nov. 7, 2000) (unpublished order). Subsequently Mr. Villegas filed another § 2254 petition, which the district court denied on the merits. *Villegas v. Williams*, No. 00-98 MV/DJS (D. N.M. July 25, 2001). Mr. Villegas did not appeal. Several years later, he filed another § 2254 petition in the district court, which transferred it to this court so Mr. Villegas could seek authorization to file it under 28 U.S.C.

§ 2244(b)(3). Mr. Villegas then filed in this court a motion seeking authorization to file a second or successive § 2254 petition.

A movant seeking to bring a second or successive § 2254 petition may proceed only with a claim not presented in a prior application that (A) “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” or (B) relies on facts that “could not have been discovered previously through the exercise of due diligence” and that “would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. §§ 2244(b)(1), (b)(2)(A), (b)(2)(B).

Mr. Villegas seeks to raise claims arising from the testimony of an expert witness at his sentencing and two claims of ineffective assistance of counsel. Mot. at 6-7A. He admits, however, that he raised the witness-testimony-related claims and allegations of institutional ineffective assistance of counsel in his prior § 2254 proceeding. *Id.* at 6-7; *see also Villegas v. Williams*, No. 00-98 MV/DJS, at 2-4 (D. N.M. May 2, 2001) (magistrate judge’s analysis of claims in the proposed findings and recommendations) (“May 2, 2001 Analysis”). Thus, those claims cannot proceed. *See* 28 U.S.C. § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”).

Mr. Villegas's other ineffective assistance claim asserts that he was forced to plead guilty because of his counsel's failure to investigate and because of pressure from counsel and the defense's expert witness. This claim apparently was not presented in a prior application. *See* Mot. at 7A; May 2, 2001 Analysis at 2-4. It does not rely on a new rule of constitutional law, but Mr. Villegas alleges that it relies on new evidence. Mot. at 7A. Nothing in the motion for authorization or the § 2254 petition transferred to this court, however, identifies the new evidence or explains how any such evidence could not have been discovered previously through the exercise of due diligence. Therefore, this claim does not meet the requirements of § 2244(b)(2)(B).

Mr. Villegas's motion for authorization to file a second or successive § 2254 petition is DENIED. This denial of authorization is not appealable and may not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk